

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-14863
Non-Argument Calendar

D. C. Docket No. 04-20310-CR-MGC

<p>FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT August 12, 2005 THOMAS K. KAHN CLERK</p>
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISMAEL HERNANDEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 12, 2005)

Before BLACK, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

Ismael Hernandez appeals his sentence imposed after pleading guilty to one count of conspiracy to steal goods in excess of \$1,000, which were part of an interstate freight shipment, in violation of 18 U.S.C. §§ 371, 659. In his pre-*United States v. Booker*, 125 S. Ct. 738 (2005) brief, Hernandez argues the district court violated *Blakely v. Washington*, 124 S. Ct. 2531 (2004), by sentencing him based on a finding of a loss amount in excess of \$400,000, which was neither reflected in the indictment, nor admitted in his plea colloquy. We vacate and remand for resentencing consistent with *Booker*.

Because Hernandez raised a *Blakely* objection before the district court, we review his sentence de novo, but will reverse only for harmful error. *See United States v. Paz*, 405 F.3d 946, 948 (11th Cir. 2005). We have clarified there are two types of *Booker* error: (1) Sixth Amendment, or constitutional, error based upon sentencing enhancements imposed under a mandatory Guidelines system neither admitted by the defendant nor submitted to a jury and proven beyond a reasonable doubt; and (2) statutory error based upon sentencing under a mandatory Guidelines system. *United States v. Shelton*, 400 F.3d 1325, 1329–30 (11th Cir. 2005).

U.S.S.G. § 2B1.1(b)(1)(H) provides if the amount of loss exceeded more than \$400,000, but less than \$1,000,000, a base offense level should be increased by 14 points. Where a defendant admits to the facts that enhanced his sentence,

there is no Sixth Amendment violation under *Booker*. See *Shelton*, 400 F.3d at 1330; see also *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005) (withdrawal of factual PSI objection constitutes admission).

Hernandez admitted to the amount of loss of \$400,000 to \$1,000,000 that formed basis for the 14-point enhancement. Hernandez never contested that he was responsible for this amount of loss because (1) he did not object to the factual statements in the PSI regarding the amount of loss, and (2) he specifically informed the court that “[we] are not litigating the facts as to whether there was \$1 million in the truck or \$1 billion in the truck or a penny in the truck.” Accordingly, because Hernandez admitted to the facts that enhanced his sentence, there is no Sixth Amendment violation under *Booker*. Furthermore, Hernandez never challenged the sufficiency of the evidence supporting the valuation in the district court and raises the sufficiency argument for the first time on appeal, despite his claim in the district court that he was not challenging the facts.

Even in the absence of constitutional error, *Booker* error exists where the district court imposes a sentence under a mandatory Guidelines system. *Shelton*, 400 F.3d at 1330–31. The district court sentenced Hernandez under a mandatory Guidelines system, thus statutory error exists. See *id.* “A non-constitutional error is harmless if, viewing the proceedings in their entirety, a court determines that the

error did not affect the sentence, or had but very slight effect. If one can say with fair assurance . . . that the sentence was not substantially swayed by the error, the sentence is due to be affirmed even though there was error.” *United States v. Mathenia*, 409 F.3d 1289, 1292 (11th Cir. 2005) (internal quotation marks and brackets omitted). The burden is on the government to show the error was harmless. *Id.*

The Government concedes that it cannot meet its burden. The district court imposed a sentence at the low end of the applicable guidelines range and announced an alternative sentence of six months’ imprisonment in case the Supreme Court ruled that *Blakely* was applicable to the Guidelines. Accordingly, because there is evidence in the record the district court would have imposed a lesser sentence on Hernandez, we vacate and remand for resentencing consistent with *Booker*. We note the district court correctly calculated Hernandez’s Guidelines range of 24 to 30 months’ imprisonment. *See United States v. Crawford*, 407 F.3d 1174, 1178–79 (11th Cir. 2005) (stating after *Booker*, district courts must consult the Guidelines and “[t]his consultation requirement, at a minimum, obliges the district court to calculate *correctly* the sentencing range prescribed by the Guidelines”). Thus, on remand, the district court is required to sentence Hernandez according to *Booker*, considering the Guidelines range of 24 to

30 months' imprisonment and "other statutory concerns as well, see [18 U.S.C.] § 3553(a) (Supp. 2004)." *Booker*, 125 S. Ct. at 757.¹

VACATED AND REMANDED.

¹ We do not mean to imply by our holding that on remand the district court must impose a lesser sentence. Rather, we merely hold the Government has not met its burden to show the statutory error was harmless. We also will not attempt to decide now whether particular sentences below the Guidelines range might be reasonable in this case.